Petition

Office - Supreme Court, U.S.
FILED
DEC 18 1982
ALEXANDER L. STEVAS,
CLERK

81-1534

NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILLIAM PACHECO NIEVES,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT,

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

P E T I T I O N

CARLOS V. GARCIA GUTIERREZ
Banco de Ponce Building
Suite 907
1250 Ponce de León Avenue
Santurce, Puerto Rico 00907
Tel. (809) 725-1020

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE EXCLUSIVELY CIRCUMSTANTIAL EVIDENCE INTRODUCED AGAINST THIS DEFENDANT IN A FEDERAL CONSPIRACY TRIAL CAN SUSTAIN HIS CONVICTION WHERE THE FACTS ESTABLISHED BY THE GOVERNMENT WOULD ALLOW THE JURY TO REACH A VERDICT OF GUILTY ONLY BY BOOTRAPPING A SINGLE PREMISE INTO A CONCLUSION THROUGH A LOGICAL PROCESS IN WHICH EVERY INFERENCE IS SUPPORTED BY NO OTHER EVIDENCE THAN THE PRIOR INFERENCE, IN VIOLATION OF THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS RIGHTS TO HAVE HIS GUILT ESTABLISHED BEYOND A REASONABLE DOUBT AND NOT TO BE FOUND GUILTY BY ASSOCIATION.

2. WHETHER THE DEFENDANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO THE DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY WHEN AFTER A THREE WEEK TRIAL THE SEQUESTERED JURY TWICE ASKED THE TRIAL JUDGE TO REDEFINE CONSPIRACY AND THE

COURT MERELY ORDERED THE COURT STENOGRAPHER TO READ TO THE JURY THE BOILERPLATE INSTRUCTION ON THE DEFINITION OF CONSPIRACY AT DEVITT & BLACKMAR 27.04.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i, ii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL, PROVISIONS, STATUTES, ETC. - FIFTH AMENDMENT.....	1
SIXTH AMENDMENT	2
TITLE 18 USC 371	3
CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES	3
STATEMENT OF THE CASE	4-9
ARGUMENT	
1ST QUESTION	10-15
2ND QUESTION	15-18
CONCLUSION	19
APPENDIX	1-16

TABLE OF AUTHORITIES

CASES

Bollenbach vs. United States, 326 US 607 (1946)	14,16,17
Delli Paoli vs. United States, 352 US 232 (1957)	14

PAGE

Direct Sales Company v. United States, 319 US 703, 714 (1943) 13

Grunewald v. United States, 353 US 391, 404-405 (1957) 14

Krulewitch vs. United States, 336 US 440, 445-458 (1949) 14

Lutwak v. United States, 344 US 604 (1953) 14

M. Kraus & Bros. v. United States, 327 US 614 (1946) 16

Morissette v. United States, 342 US 246, 275 (1952) 12

Quercia v. United States, 289 US 466 (1933) 18

Yates v. United States, 354 US 298 (1957) 17

CONSTITUTION, PROVISIONS & STATUTES:

United States Constitution

Fifth Amendment i,1, 10,12

Sixth Amendment ii,2 15

18 USC 1341, 1343, 1952 4

371 1,3

28 USC 1254 (1) 1

PAGE

OTHER AUTHORITIES:

Devitt & Blackmar §27.04 16

Marcus, Conspiracy: The Criminal Agreement in Theory and Practice, 65 Geo. L.J. 925 (1977) at 954-955 13

2. Wright, Federal Practice and Procedure; Criminal §482 18

OPINION BELOW

The opinion of the U.S. Court of Appeals for the First Circuit appears at 658 F2d 14 (1st Cir. 1981) and is reproduced in the Appendix at pp. 1-12.

JURISDICTION

The judgment of the court of appeals was entered on 8 September 1981 (App. 13). The petition for rehearing was denied on 19 October 1981 (App. 14). The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18 USC 371

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdeamenor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdeamenor.

STATEMENT OF THE CASE

Petitioner William Pacheco Nieves was tried with two other codefendants on a multiple count indictment which charged a conspiracy under 18 USC 371 to violate, and substantive offenses under, 18 USC 1341 (mail fraud), 1343 (wire fraud) and 1952 (interstate travel to commit arson). The petitioner was charged and convicted only in the conspiracy count. The accusations resulted from a scheme to collect insurance payments through the destruction by arson of the insured business and premises of an electric and household appliances distributors, Delta Enterprises. As increasingly happens in prosecutions for conspiracy the Government's evidence as to a group of conspirators was strong, direct and dramatic, as to the petitioner the evidence was exclusively circumstantial, weak and diffuse.

Charles Benmuhar, owner of Delta Enterprises, engaged William Salón and Jesús Lazo, members of a Florida based terrorist group, to set fire to his own business to avoid bankruptcy. Benmuhar and Lazo were not tried with petitioner. Salón testified extensively for the government under immunity. He gave a detailed description of the negotiations, the execution and the collection of payment for the arson. A number of other witnesses and documentary evidence established the processing of the claim for payment under the insurance policy and an aborted prosecution for arson in the Commonwealth of Puerto Rico courts against several Delta employees and three youths. All of this evidence was shot through with the drama and credibility of an arsonist, who is also a political terrorist, speaking about his own misdeeds; the detailed wrangling of an insurance claim for a million and a

half dollars; a local prosecution with an aura of scandal. This evidence constitutes the overwhelmingly greater part of the record on which the jury found the petitioner guilty.

The evidence against petitioner showed that at the time of the arson he was acting director of the Criminal Investigation Corp of the Puerto Rican Police Department. He knew socially Charles Benmuhar and other Delta employees. As CIC acting director he was the superior of the police agents who investigated the fire and in the course of normal operations would know about the progress of the investigation. On the morning after the fire Benmuhar asked one of his employees to call Pacheco, who was the friend of both, to ask for permission to remove company records from the debris. Pacheco informed his superior that he was going to the fire scene and invited him to come along. The invitation

was declined. One or two days later Delta employees visited Pacheco's office to enquire about the investigations progress. Petitioner called the agent in charge of the investigation to his office and after telling him the persons present were from Delta asked if any progress had been made in the investigation. The answer was in the negative. Pacheco made other enquiries about the investigation's progress which were thought unusual by his subordinates. He obtained no information from them. Pacheco's superior, who at trial testified that at no time had he lost confidence in the petitioner, ordered strict control of all information related to the Delta investigation because Pacheco was generally known to be friends with Delta people.

Testimony was also given that Charles Benmuhar personally bought in Miami a Pontiac car for petitioner about two

months after the fire. The government handwriting expert, however, could not confirm or exclude the possibility that the signature on the notarized deed of sale was Pacheco's. All the other numerous documents related to the sale, transportation to, registration and payment of exercise taxes in Puerto Rico were in Pacheco's name and those which required it were in fact signed by him.

The jury which convicted petitioner was instructed on Wednesday, 5 March 1980. The very next day, early in the morning, they requested to hear the testimony of two of the police department witnesses who testified about Pacheco's actions while the investigation was in progress. The jury also wrote that they were "in need for the definition for the definition of conspiracy." That Thursday afternoon they again asked for one of the agent's testimony and again expressed a

need for definition of conspiracy. On both occasions the trial judge ordered the court stenographer to read to the jury the requested testimony and the two instructions which had been given in the general charge which had set out the crime charged and defined conspiracy. Petitioner requested that the jury also be reinstructed on the needed specific intent to violate the substantive statutes and that mere presence was not proof of participation in the conspiracy. The court denied these requests. Petitioner objected.

On Friday, March 7th, the jury requested that the closing arguments for petitioner Pacheco and the government be read to them. This the court refused. Later in the day the jury asked for the testimony of the Pontiac salesman. On Saturday afternoon they returned a verdict of guilty against the petitioner.

A R G U M E N T

1. WHETHER THE EXCLUSIVELY CIRCUMSTANTIAL EVIDENCE INTRODUCED AGAINST THIS DEFENDANT IN A FEDERAL CONSPIRACY TRIAL CAN SUSTAIN HIS CONVICTION WHERE THE FACTS ESTABLISHED BY THE GOVERNMENT WOULD ALLOW THE JURY TO REACH A VERDICT OF GUILTY ONLY BY BOOTRAPPING A SINGLE PREMISE INTO A CONCLUSION THROUGH A LOGICAL PROCESS IN WHICH EVERY INFERENCE IS SUPPORTED BY NO OTHER EVIDENCE THAN THE PRIOR INFERENCE, IN VIOLATION OF THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS RIGHTS TO HAVE HIS GUILT ESTABLISHED BEYOND A REASONABLE DOUBT AND NOT TO BE FOUND GUILTY BY ASSOCIATION.

This question addresses unsettled but recurring issues in the field of conspiracy law. What is the quantum of circumstantial evidence needed to establish beyond a reasonable doubt that a particular defendant entered into a conspiratorial

agreement? How is the validity of the inferential process to be determined?

Petitioner does not dispute that a valid conviction for conspiracy can rest on exclusively circumstantial evidence. But the facts of this case and the opinion rendered by the court of appeals are an exceptionally clear example of the law's present indiference to the need of measuring against pre-established standards the logical sequence from facts to conclusion through which a legally valid inference can be made.

A Court, trial or appellate, is only second-guessing the jury when it holds that a finding of guilt on circumstantial evidence was legally made if the court only sets out the primary facts and asserts, without any enquiry into the inferential process, that on those facts the jury could find the defendant guilty of the crime charged. The only way to test the sufficiency of the

facts is to enquire into the validity of the logical structure on which the conclusion is founded. All that is needed is the requirement that the facts which underpin the conviction for the indicted crime can be shown to fit the commonplace patterns of everyday thought; a major premise, a minor premise, a conclusion. A conviction based on a mere collocation of facts and a leap to possibilities allows the taking of life, liberty and property on suspicion or for a crime not charged.

The structure of inferences has been neglected by the courts when compared with the care that has been given to the effect and need for conformity to the rules of logic in the case of presumptions. See for example, Morissette v. United States, 342 US 246, 275 (1952). This state of indefition in a necessarily formal process cannot continue since it undermines the Fifth Amendment's due process requirement that

the evidence establish guilt beyond a reasonable doubt. There is growing concern that the courts have relaxed too far their vigilance on the question of the evidence sufficient to prove the agreement in conspiracy cases. Marcus, Conspiracy: The Criminal Agreement in Theory and Practice, 65 Geo. L.J. 925 (1977) at 954-955. Such laxity cannot be justified on the often repeated grounds that because conspiracies are hatched in secret the agreement must usually be proved circumstantially since such proof need not and indeed cannot be equivocal. Direct Sales Company v. United States, 319 US 703, 714 (1943).

The reliance on the many possibilities of what the jury could make of the evidence exemplified by the court of appeals' opinion in this case, rather than on principled judicial analysis, also subverts this Court's restrictive policy on the law of conspiracy. Grunewald v. United States,

353 US 391, 404-405 (1957), citing Mr. Justice Jackson's concurring opinion in Krulewitch v. United States, 336 US 440, 445-458 (1949) and Delli Paoli v. United States, 352 US 232 (1957); Lutwak v. United States, 344 US 604 (1953); Bollenbach v. United States, 326 US 607 (1946). Surely a policy meant to confine the crime of conspiracy within its historical and recognizable limits must also require that the dragnet not be allowed to expand by making a conviction possible on the supposition that the jury could have made one or more inferences that nobody else can articulate or judge by adequate standards.

The danger of incurring guilty by association is probably nowhere greater than in a conspiracy trial. The need to establish clear guidelines for both juries and judges on how to sift and connect the facts presented to them is therefore all the more pressing. Especially in cases

where the courts have sanctioned the pervasive use of circumstantial evidence in trials which usually require the presentation of complex factual situations involving many actors over long periods of time.

2. WHETHER THE DEFENDANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO THE DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY WHEN AFTER A THREE WEEK TRIAL THE SEQUESTERED JURY TWICE ASKED THE TRIAL JUDGE TO REDEFINE CONSPIRACY AND THE COURT MERELY ORDERED THE COURT STENOGRAPHER TO READ TO THE JURY THE BOILERPLATE INSTRUCTION ON THE DEFINITION OF CONSPIRACY AT DEVITT & BLACKMAR 27.04.

Review is sought on this issue because the trial judge did not comply with his duty to instruct the jury and became a referee between the parties. This conduct was sanctionned by the court of appeals.

During deliberations which extended

over four days in which the jury returned time and time again to the testimony introduced against petitioner they twice asked for a definition of conspiracy. The trial judge had a boilerplate instruction read back to them by the court stenographer. The trial court should have instructed the jury again not only as to the nucleus of the crime of conspiracy but it had also to instruct them with particular care as to the precise outer limits of the dragnet. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 US 607, 613 (1946); M. Kraus & Bros. v. United States, 327 US 614, 627 (1946).

Very few other things can be as uninstructive as twice reciting to a jury in need Devitt & Blackmar's §27.04 without further clarification. The difficulty of grasping the precise limits of a conspiracy is not different from the subtlety

required to distinguish between protected and criminal speech in a prosecution for subversion. In that context, citing Bollenbach this court again emphasized the importance of well instructing a jury particularly where, as here, the issue is a close one. Yates v. United States, 354 US 298, 327 (1957). In such a situtation the trial judge cannot abdicate his responsibility to instruct a jury on the law because the jury does not ask for complete instructions. The Court cannot rely on the jury's capacity to determine their own need for instruction, furthermore, when as here that need is twice repeated. Repetition can be understood to be nothing more than reiteration. But a jury that twice asks for the definition of conspiracy quite clearly is troubled over what they heard in the general charge and what was repeated to them at the first request. To assume that they know what they want on the third

occasion when they are obviously not satisfied with instructions twice heard is for the trial court to act with a vengeance as impartial arbiter. That the trial court cannot do. Quercia v. Unites States, 289 US 466, 469-470 (1933). Nor is the trial court allowed to be the mere umpire and mouthpiece of the parties since the duty to instruct is his even without a request by the parties. 2. Wright, Federal Practice and Procedure; Criminal §482.

It was clearly erroneous for the District Court to omit the instructions requested by counsel when the jury sought information as to the definition of conspiracy. The court abdicated its duty to instruct the jury and met their repeated requests for a definition with an answer as meaningless as no answer at all.

C O N C L U S I O N

The petition for a writ of certiorari should be granted.

Respectfully submitted.

In San Juan, Puerto Rico at this 18th day of December 1981.

CARLOS V. GARCIA GUTIERREZ
Banco de Ponce Building
Suite 907
1250 Ponce de León Avenue
Santurce, PR 00907
Tel. (809) 725-1020

Appendix

United States Court of Appeals
For the First Circuit

No. 80-1252

UNITED STATES OF AMERICA,

APPELLEE,

v.

MOISES BENMUHAR,

DEFENDANT, APPELLANT.

No. 80-1266

UNITED STATES OF AMERICA,

APPELLEE,

v.

WILLIAM PACHECO NIEVES,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF PUERTO RICO
[HON. JUAN R. TORRUELLA, *U.S. District Judge*]

Before, COFFIN, *Chief Judge*,
GIBSON, *Senior Circuit Judge*,*
CAMPBELL, *Circuit Judge*.

Harvey B. Nachman, for appellant Moises Benmuhar.
Carlos V. Garcia Gutierrez, for appellant William Pacheco Nieves.
Mervyn Hamburg, Attorney, Department of Justice, with whom *Raymond Acosta*, United States Attorney, was on brief, for appellee.

September 8, 1981

COFFIN, *Chief Judge*. Appellants Moises Benmuhar and William Pacheco Nieves appeal from their criminal convictions. Both were indicted on a count that charged that they conspired with Benmuhar's cousin Charles Benmuhar and

* Of the Eighth Circuit, sitting by designation.

with Jose Barlia and Jesus Lazo to insure a Puerto Rican company, Delta International, Inc., for over $2 million. The count further charged that the conspiracy planned the successful destruction of Delta's warehouse by arson. The indictment claimed that the conspiracy violated 18 U.S.C. §§ 2, 371, 1341, 1343 and 1952.

Appellant Benmuhar was also indicted, together with Charles Benmuhar and Jose Barlia, on three additional counts of mail fraud, 18 U.S.C. §§ 2 & 1341, and two additional counts of wire fraud, 18 U.S.C. §§ 2 & 1343. Each fraud count related to the same scheme described in the conspiracy count, but each involved a separate interstate communication with the insurance company, whose main offices were in New York and Massachusetts.

Charles Benmuhar was the "core figure" in the arson scheme, but he fled to Venezuela and has not yet been extradited. Jesus Lazo is still a fugitive. Appellants were tried with Jose Barlia. Appellants were convicted on all counts, while Barlia was acquitted.

I. SUFFICING OF EVIDENCE

A. BENMUHAR

Both appellants argued there was insufficient evidence to support their convictions. Viewing the evidence in the light most favorable to the government, *United States* v. *Ciampaglia*, 628 F.2d 623, 637 (1st Cir. 1980), we think there was sufficient evidence to permit a reasonable jury to find Benmuhar guilty beyond a reasonable doubt of both the conspiracy and the substantive mail and wire fraud counts.

Evidence that the jury could have believed showed that Benmuhar was an officer and sales manager of Delta International. Benmuhar's cousin Charles was Delta's president. When Delta's accountant informed Charles that Delta would be facing bankruptcy within months, Charles replied that he would prefer to destroy the company's warehouse than go through bankruptcy.

Charles hired contract arsonists to come from Florida. When they arrived, Charles gave them a tour of Delta's

premises, pointing out the electrical controls and the sprinkler system, and introduced them to the appellant Benmuhar. The arsonists returned to Florida.

On their trip to Puerto Rico, the arsonists met with Charles and appellant Benmuhar. One arsonist stated that he would "need some potassiun chloride in order to be able to set the fire." Charles replied that he would have appellant Benmuhar drive the arsonists to a place to purchase the chemical. Appellant Benmuhar and the arsonists looked in a telephone book for a location for the purchase. Then the three drove there, and appellant Benmuhar walked in and bought the potassium chloride while the others waited in the car. The three then tried to locate some sulfuric acid. They located some after trying two more places. Appellant Benmuhar again purchased the chemical.

Later, all three assembled with Charles and others at the warehouse, poured drinks, and toasted to "the success of what was about to take place." The arsonists then prepared to light the fire while the others, including appellant Benmuhar, gathered by the exit. After igniting the blaze, the arsonists signaled and all left the building, which burned.

Appellant Benmuhar and Charles subsequently met with the claims adjuster for the insurance company with which Delta's fire insurance claim was filed. Both men participated in providing the insurance company with documents it requested during its investigation.

As this recital makes clear, the evidence is sufficient to establish that appellant Benmuhar joined an arson conspiracy, knowing of its essential and illegal character, and committed overt acts in its furtherance. The government may not have established that appellant Benmuhar knew every detail of the conspiracy, but this is not its burden. *E.g.*, *United States* v. *McCarthy*, 611 F.2d 220, 222 (8th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980).

The evidence similarly shows that appellant Benmuhar both directly and vicariously, *see Pinkerton* v. *United States*, 328 U.S. 640 (1946), participated in devising a scheme to defraud in which use of the mails and interstate telephoning would foreseeably follow in the ordinary course of business. That appellant Benmuhar did not personally mail or telephone any communications makes no difference in this situation. *See Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954); *United States* v. *Calvert*, 523 F.2d 895, 903 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *Bannister* v. *United States*, 379 F.2d 750, 752-53 (5th Cir. 1967), *cert. denied*, 390 U.S. 927 (1968).

B. PACHECO

We similarly think that the evidence properly supported appellant Pacheco's conspiracy conviction. The proof at trial showed that at the time of the arson Pacheco was acting director of the Criminal Investigations Corps of the Puerto Rican Police, an office containing within it the arson investigation section. Pacheco had a longstanding social relationship with appellant Benmuhar, Charles, and at least one other Delta employee.

Pacheco intervened in the Delta arson investigation in a number of instances. Immediately after the fire, police refused to permit Charles to remove business documents from a fireproof room. Charles then asked an employee to call Pacheco at his home. Pacheco responded by coming to the scene and securing the documents released.

The day after the fire, Pacheco summoned a staff investigator on the case to his office, where Pacheco was meeting with three representatives from Delta. Before these potential arson suspects, Pacheco questioned the investigator about the progress of his work on the case. He responded that the matter was still under investigation. The investigator said at trial that such questioning of an investigator before potential suspects was unprecedented and at odds with the section's policy about

public disclosure. He further testified that it was "very unusual" for persons affected by a fire "to immediately come to our office to know what is going on".

Pacheco made other unusual requests for inside information on the Delta investigation. About two months after the fire, he asked another investigator on the case "if [he] had any suspects, if [he] had any information. What would happen. What [he] found, and what [he] had relating to the investigation." Pacheco made three or four such inquiries of this investigator. The investigator stated that "[n]ever, never before" had Pacheco made such requests, nor was he able to recall any subsequent investigations about which Pacheco had so inquired.

Pacheco's superior also had observed Pacheco meeting with Delta employees after the fire. One of the men the superior knew only as "Mr. Benmuhar". The superior then ordered investigating agents to avoid disclosing information on the investigation to anyone, with specified exceptions that did not include Pacheco. One reason for his order was the fact that Pacheco had met with executives of the Delta Company after the fire. The superior testified that it was against policy to disclose information concerning investigations to persons who might be affected by the investigation.

About two months after the fire, Charles bought a new Pontiac car in Miami for about $6000 in cash. None of the sales documents bore Charles' name, although some *were* signed in the name of William Pacheco Nieves. The government handwriting expert could neither confirm nor exclude the possibility that Pacheco in fact had penned the signatures. The car was shipped to Pacheco in Puerto Rico, where it was registered under Pacheco's name until it was sold to a third party in 1979.

This evidence, although not overwhelming, is sufficient to support Pacheco's conviction. The jury could have found from the testimony that Pacheco attempted to take advantage of his official position to gain otherwise secret information about the

progress of the Delta arson investigation. The unusual character of his meeting with potential defendants immediately after a suspected criminal event could create an inference that conspiratorial activity was afoot, and Pacheco's unprecedented interest in ascertaining the status of this investigation—manifested in one instance by improper questioning in the presence of potential suspects—could support the accompanying inference that Pacheco intended to relay this information directly or indirectly to his coconspirators. Although the government's failure to prove that Pacheco succeeded in obstructing the investigation weakens its case, this does not conclusively rebut the foregoing inferences since the jury could have believed that Pacheco would have done more, but for the evident vigilance and caution of his superior. Finally, Charles' apparently surreptitious purchase of the car in Pacheco's name provides a credible motive for Pacheco's involvement in the conspiracy. The government therefore produced substantial evidence from which the jury could have concluded that Pacheco, a high police official, undertook unusual and improper actions for the benefit of potential arson suspects during the course of an arson investigation in consideration for an apparently improper and secret gift. We cannot say that no reasonable jury could have concluded from this that Pacheco was guilty beyond reasonable doubt of knowing participation in the conspiracy to defraud Delta's insurers.

II. DOUBLE JEOPARDY

Appellant Benmuhar argues that his conspiracy conviction violated the double jeopardy clause of the Fifth Amendment. He points out that he was previously charged with arson, 33 L.P.R.A., §1561, and destruction of an insured building, *id.*, §1902, under Puerto Rican law, and that these charges were dismissed after preliminary hearing for lack of sufficient evidence. Even assuming that these substantive counts amount to the same crime as conspiracy, *but see Illinois* v. *Vitale*, 447

U.S. 410, 415-16 (1980); *Harney* v. *United States*, 306 F.2d 523, 531 (1st Cir.), *cert. denied*, 371 U.S. 971 (1962), and that federal double jeopardy protection attaches before the jury is sworn, *but see Crist* v. *Bretz*, 437 U.S. 28 (1978), no double jeopardy immunity bars the federal conspiracy conviction; a single act can violate both state and federal law and can thus create two separate offenses. *See, e.g., United States* v. *Wheeler*, 435 U.S. 313, 317 (1978). The reference to the state law crime of arson in 18 U.S.C. §1952(b) does not alter this analysis since it is clear that Congress intended that violations of §1952 would be crimes distinct from the substantives state law offenses that §1952(b) lists for definitional purposes.[1] *See* H.R. Rep. No. 966, 87th Cong., 1st Sess. 2, *reprinted in* [1961] U.S. Code Cong. & Ad. News 2664, 2665 ("[T]his bill . . . will not preempt the area covered by it. Those violations of State law . . . will be subject to State and local prosecution by State and local authorities. Nothing in this bill is to be construed as immunizing any violator of State law from State prosecution.") *See also United States* v. *Malatesta*, 538 F.2d 748, 757-58 (5th Cir. 1978), *aff'd en banc in relevant part*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *United States* v. *Cerone*, 452 F.2d 274, 286-87 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972).

---

[1] "§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

. . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means . . . *arson* in violation of the laws of the State in which committed or of the United States" [emphasis added].

III. JURY SELECTION

Appellant Benmuhar also claims that the jury selection process in this case violated his Sixth Amendment right to a jury comprised of a fair cross section of the community. He argues that Puerto Rico's requirement that jurors be proficient in English tends to exclude various categories of jurors. Although we found such exclusion to be permissible in *Miranda* v. *United states*, 255 F.2d 9, 16-17 (1958), appellant urges a different result based on the recent decision of *Duren* v. *Missouri*, 439 U.S. 357 (1979). *Duren* approaches claims of unconstitutional jury disproportionality by placing the burden of establishing a prima facie case on the defendant, who must show

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 364.

Appellant claims that various "distinctive" groups are either overrepresented or underrepresented on impanelled juries in comparison with their proportion of the Puerto Rican population.[1] We assume without deciding that all these groups are "distinctive", and that the asserted percentage differences show that jury representation of these groups is not fair and reasonable.

In next considering whether appellant has demonstrated that these deviations are due to "systematic exclusion" in the jury-selection process, we observe that the only "systematic" characteristic that he explains is Puerto Rico's exclusion of potential jurors who cannot "read, write, or understand the

[1] Appellant identifies nine groups that he maintains are "distinct": residents of the San Juan area; women; professional/managerial/white collar workers; industrial/farming/fishing workers; unemployed/retired/housewives; individuals with 8th grade educations or less; individuals with more than high school education; whites; and blacks.

English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form" or who cannot "speak the English language." 28 U.S.C. §1865 (b) (2) & (3).[3] We hold that appellant satisfactorily demonstrates that the English proficiency requirement does operate in a "systematic" manner. *See Duren*, 439 U.S. at 366-67. We limit our inquiry to this one factor, however, since appellant does not suggest that other unspecified factors operate in a systematic fashion so as to cause jury disproportionality.

The government seeks to rebut the assumed prima facie case by showing that "a significant state interest [is] manifestly and primarily adanced" by English proficiency requirement. *Id.* at 367. The interest is that of having a branch of the national court system operate in the national language. This interest is precisely tailored to the jury exclusion criterion, so there is no question that the interest is "manifestly and primarily advanced" by the requirement. The only question therefore is whether the national language interest is "significant".

When the government's interest is properly characterized in such broad terms as assuring that national courts are conducted in the national language,[4] we believe it can be fairly

---

[3] Appellant in a sworn statement states that Puerto Rico randomly selected 60,000 names from voter registration lists and divides those into 30 lists of 2000 each. Seven of these lists were chosen at random and juror questionnaires were sent to the 14,000 persons. Of the 8505 responses, "nearly half" were eliminated "for lack of sufficient knowledge of the English language", two were eliminated because they were improperly filled out, and 1924 were eliminated "for other factors." The total number of names placed in the qualified jury wheel was 2137. Eighteen percent of the qualified jurors were then eliminated at the impanelling stage.

Appellant explains neither the precise content nor the exact manner of operation of the English proficiency requirement.

[4] Appellant states that "both the English language and adequate representation could be achieved" and elaborates only by asserting that "[i]f English is to be preserved as the language of the federal court in Puerto Rico, something must be put back into the system to make it representative and constitutional." Had the appellant suggested some concrete means of reconciling the national language interest with a jury selection system with a lesser

described as significant. Federal district courts in part are designed to provide trial alternatives for litigants, resident and nonresident, who seek the uniformity, expertise, and familiarity that they believe they may find in a national rather than a local forum. Primary use of the national language is both symbolically and functionally significant in achieving this goal. Nonresident citizens who do not speak Spanish may use the Puerto Rican federal district court without unusual requirements. The Attorney General of the United States may appear personally or by representative without being limited by considerations of fluency in Spanish. Other judges may sit by designation as needed without regard to their ability in Spanish. Possible translation distortions in indictments and complaints based on statutes written in English are avoided, as they are again during appellate review. *See generally United States* v. *Valentine*, 288 F. Supp. 957, 964-65 (D.P.R. 1968).

We consequently decide that the national language interest is significant. Appellant therefore was not denied a representative jury in violation of the Sixth Amendment. We note that this judgment is a narrow one. It expresses no opinion as to the ability of Congress to achieve different results through legislation or as to a case in which the appellant identified and the government did not respond to policy accommodations that could achieve the national language interest without the need for such an English proficiency requirement for jurors.

---

impact on jury representation, we would have expected some reply from the government. As the record now stands, however, there is absolutely no discussion of the feasibility of administrative or technological options that could satisfy the government's interest without imposing the English proficiency requirement upon jurors. We do not believe that the government has the burden under *Duren* v. *Missouri*, 439 U.S. 357, 367-70 (1979), of demonstrating the unavailability or impracticality of alternative policy accommodations when we find its general national language interest to be significant and when the appellant has not suggested any even generally promising avenues of inquiry.

IV. OTHER ISSUES

We deal finally—and briefly—with several other objections. Both appellants complain that the district court improperly limited supplemental instructions read in response to the jury's twice-repeated request that "the definition of conspiracy" be repeated. The court replied by reciting section 28.04 of Devitt & Blackmar's Federal Jury Practice and Instructions, which it had previously included as part of its general instruction on conspiracy. Appellants requested that two additional parts also be reread, to define the term "specific intent" and to explain that "[m]ere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that defendants aided and abetted a crime, unless you [the jury] find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator." They did not request that other, less favorable portions of the lengthy conspiracy instruction be repeated. The judge denied appellants' request on the grounds that the jury asked only for the definition of, not the entire instruction on, conspiracy; that the basic conspiracy definition he proposed to read covered the additional material upon which appellants sought elaboration; and that to grant appellants' request would be to emphasize unduly one portion of the total conspiracy instruction. We cannot fault this reasoning. *See, e.g., United States* v. *Chatham*, 568 F.2d 445, 451 n.10 (5th Cir. 1978); *Whiting* v. *United States*, 321 F.2d 72, 75 n.3 (1st Cir.), *cert. denied*, 375 U.S. 884 (1963).

Appellant Benmuhar's consecutive sentencing under the first conspiracy count and the second mail fraud count did not violate *Blockburger* v. *United States*, 284 U.S. 299 (1932). The first count required the government to prove that appellant agreed to join a conspiracy involving the foreseeable use of the mails, while the second count did not. *See Iannelli* v. *United States*, 420 U.S. 770, 777 n.10 (1975). The second count required the government to prove that appellant aided in caus-

ing the use of the mails for purposes of executing a scheme to defraud, while the first count did not. *See, e.g., Harney* v. *United States*, 306 F.2d 523, 531 (1st Cir.), *cert. denied*, 371 U.S. 971 (1962). The government's proof was sufficient with respect to each of these distinctions.

Neither was it error to convict appellant for separate mail and wire fraud violations on the basis of different telephone and mail communications, even though there was but a single fraudulent scheme. *E.g., United States* v. *Moss*, 631 F.2d 105, 106-07 (8th Cir. 1980).

Affirmed.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 80-1266.

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM PACHECO NIEVES,
Defendant, Appellant.

JUDGMENT

Entered September 8, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ DANA H. GALLUP

[cc: Messrs. Garcia Gutierrez and Acosta.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FILED
IN CLERK'S OFFICE

No. 80-1252.

UNITED STATES OF AMERICA,
Appellee,

v.

MOISES BENMUHAR,
Defendant, Appellant.

No. 80-1266.

UNITED STATES,
Appellee,

v.

WILLIAM PACHECO NIEVES,
Defendant, Appellant.

Before COFFIN, Chief Judge,
GIBSON, Senior Circuit Judge,*
CAMPBELL, BOWNES and BREYER,
Circuit Judges.

ORDER OF COURT

Entered: October 19, 1981

Upon consideration of "Petition for Rehearing and Suggestion for a Rehearing En Banc," which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said applications for hearing en banc in the above captioned cases are hereby denied.

By the Court:

DANA H. GALLUP, Clerk.

By /s/ Francis P. Scigliano
Chief Deputy Clerk.

*Of the Eighth Circuit, sitting by designation. (cc: Messrs. Nechman and Acosta)

§ 27.04 Conspiracy Defined--Proof of Existence

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes", in which each member becomes the agent of every other member. The gist of the offense, is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What the

evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to affect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,

No. 81-1534

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM PACHECO NIEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conspiracy conviction.

2. Whether the scope of the district court's supplemental instructions was impermissibly narrow.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Blumenthal v. *United States*, 332 U.S. 539 5

Delli Paoli v. *United States*, 352 U.S. 232 4

Glasser v. *United States*, 315 U.S. 60 4

Hamling v. *United States*, 418 U.S. 87 ..... 4, 5

Iannelli v. *United States*, 420 U.S. 770 4

United States v. *Chatham*, 568 F. 2d 445 7

United States v. *Clark*, 613 F. 2d 391, cert. denied, 449 U.S. 820 7

United States v. *Moreno-Nunez*, 595 F. 2d 1186 7

United States v. *Wharton*, 433 F. 2d 451 7

Whiting v. *United States*, 321 F. 2d 72, cert. denied, 375 U.S. 884 7

Statute:

18 U.S.C. 371 1

Miscellaneous:

Devitt & Blackmar, *Federal Jury Practice and Instructions* §27.04 (3d ed. 1977) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1534

WILLIAM PACHECO NIEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 658 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1981 (Pet. App. 13). A petition for rehearing was denied on October 19, 1981 (*id.* at 14). The petition for a writ of certiorari was filed as of December 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of conspiracy to violate the mail fraud, wire fraud, and racketeering statutes, in violation of 18 U.S.C. 371. He was sentenced to five years' imprisonment and a fine of $5,000. The court of appeals affirmed (Pet. App. 1-12).

The evidence showed that, early in May 1974, Charles Benmuhar, president of Delta International, Inc., located in Carolina, Puerto Rico, learned that his business was failing and decided to destroy the company warehouse rather than submit to bankruptcy proceedings (Tr. 1745-1746).[1] Benmuhar arranged for some individuals associated with a Miami, Florida, anti-Castro organization to burn down the warehouse for a fee of $20,000 (Tr. 406-418). The arsonists met with Benmuhar and other Delta officials several times before the evening of May 15, 1974, when they set fire to the building as agreed (Tr. 413-416, 438-439, 464-477).

The next morning, Benmuhar asked police at the scene to allow him to remove company documents from a fire-proof room inside the burned building. When they refused to permit this, Benmuhar asked Jose Tio, a Delta vice-president, to call petitioner, who was the assistant director of the Police Department's Criminal Investigation Corps, to come to the scene and authorize removal of the documents (Tr. 781, 783-784, 792-793). Petitioner was an acquaintance of Tio's and had previously been introduced by Tio to Benmuhar and other Delta officials, with whom he developed a social relationship (Tr. 784-785, 795-799). When petitioner arrived, the documents were released from the room (Tr. 794-795).

An official police investigation began on May 16, 1974, following the filing of a complaint that suggested the existence of criminal conduct in connection with the fire (Tr. 1013-1014, 1067-1068, 1122-1123, 1128). Either that day or the next day petitioner summoned to his office Braulio Donato, the acting director of the Police Department's arson and explosives squad. In petitioner's office Donato saw Tio, petitioner, and two others whom he did not recognize (Tr. 1120, 1125-1126). In front of the others, petitioner

---

[1] "Tr." refers to the trial transcript.

asked Donato whether a conclusion had been reached with regard to the origin of the Delta fire. Donato replied that the matter was still under investigation and no conclusion had yet been reached (Tr. 1126). Donato regarded this inquiry as highly irregular because it came so soon after the fire had occurred and because it was made in the presence of individuals directly affected by the investigation (Tr. 1126-1127, 1150).

The police investigation lasted several months, during which period insurance company representatives declined to make payment (Tr. 1021, 1322-1323). Two or three months into the investigation, petitioner continued to inquire about its progress. When meeting one of the investigators, Alberto Ortiz, in the hallways of the Police Department, petitioner on three or four occasions asked Ortiz how the Delta investigation was proceeding and whether there were suspects or new information (Tr. 999, 1004-1006, 1012). Petitioner, who had never before asked Ortiz for information about an ongoing arson investigation (Tr. 1005), did not explain why he desired the information about Delta (Tr. 1012). Ortiz furnished information to petitioner about the investigation solely because petitioner was his superior officer (Tr. 1008). In July 1974, at about the same time that these inquiries were being made by petitioner, he took delivery of a new Pontiac automobile that Benmuhar had purchased in Miami the previous month for $5,650, paid in cash (Tr. 873-885, 906-911, 954-959).

After Ortiz made his disclosures to petitioner, Miguel Rivera, the Director of the Criminal Investigations Corps, who had seen petitioner meeting with Tio and Benmuhar in petitioner's office and who was aware that petitioner was an acquaintance of an individual associated with Delta, issued an order forbidding the disclosure of any information about the Delta investigation except to himself or the supervisor of the arson and explosive squad (Tr. 187, 1004, 1165).

As a result of the police investigation, a formal complaint was filed in the local courts in August 1974, charging Benmuhar and others (but not the Miami-based arsonists) with the crime of arson (Tr. 820-821, 851). At a preliminary hearing on November 8, 1974, those charges were dismissed on motion of the prosecuting attorneys (Tr. 821). This dismissal triggered negotiations that resulted in an insurance settlement in the amount of approximately $1,500,000 (Tr. 1349-1350). Five years later, in December 1979, petitioner and four other persons were indicted for the arson conspiracy by a federal grand jury (Pet. App. 2).[2]

ARGUMENT

1. Petitioner contends that the evidence was insufficient to convict him on the conspiracy charge. Although recognizing that a conviction for conspiracy can rest exclusively upon circumstantial evidence, petitioner argues that there are inadequate guidelines for appellate review of such conspiracy convictions and that his own conviction was impermissibly founded upon inferences drawn from other inferences (Pet. 10-15). The claim is without merit.

The principles applicable to appellate review of a conspiracy conviction challenged on grounds of insufficiency of the evidence are not unclear: "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Accord, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). Furthermore, the agreement—the fundamental evil of the crime of conspiracy—may be shown indirectly, by circumstantial evidence. *E.g., Iannelli* v. *United States*, 420 U.S. 770, 777 n.10 (1975); *Delli Paoli* v. *United States*, 352 U.S. 232, 236

---

[2]Named as a co-conspirator in the indictment, Benmuhar fled to Venezuela. We are informed that he has not yet been returned to Puerto Rico for trial.

n.4 (1957). Thus, "[t]he existence of an agreement may be shown by circumstances indicating that criminal defendants acted in concert to achieve a common goal." *Hamling* v. *United States, supra*, 418 U.S. at 124, citing *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947).

The evident goal of the conspiracy concerned in this case was not simply to burn down the Delta warehouse but also to collect insurance money for the fire loss.[3] There was plainly sufficient evidence for the jury to find that petitioner acted in concert with the other conspirators to help achieve that goal, even if his efforts were not especially productive.

The outcome of the police arson investigation was critical to the collection of the insurance proceeds, and information concerning what leads the police were pursuing would obviously aid those who had planned the arson in preventing discovery of the cause of the fire, so that the insurance claim would be paid. Petitioner used his position in the police department to make inquiries of his subordinates regarding the progress of the investigation—including an inquiry made in the presence of Delta officials. Petitioner's inquiries concerning this one particular case were unusual—he had never, for example, questioned Ortiz in this manner before (Tr. 1005-1006). The jury was not required to find him innocent because he did not succeed in obstructing the investigation; as the court of appeals noted (Pet. App. 6), the jury could reasonably believe that petitioner's efforts were blocked by his superior's "evident vigilance and caution" in seeing that the channel of internal information was closed off. Finally, and most significantly, the jury had

---

[3]When payments of portions of the agreed-upon $20,000 fee were made to the arsonists, they were told that the full amount was not available because the insurance proceeds had not yet been collected (Tr. 484, 490).

before it evidence that Charles Benmuhar—the chief conspirator—surreptitiously purchased an automobile for petitioner two months after the fire occurred. No fragile structure of inferences piled upon inferences need be erected to reach the conclusion that petitioner agreed to aid Benmuhar and his associates in the insurance-collection phase of the conspiracy and was generously compensated for his efforts.

2. After receipt of the closing charge, the jury deliberated for a short time on March 5, 1980, and then recessed. On the following day the jury sent a note to the judge requesting "the definition of conspiracy" and the re-reading of the testimony of two government witnesses (March 6 Tr. 3-4). The court responded by ordering the court reporter to read to the jury the standard definition of conspiracy (contained in Devitt & Blackmar, *Federal Jury Practice and Instructions* §27.04 (3d ed. 1977)), which the court had originally given. The court refused defense counsel's request to expand the supplemental instruction on conspiracy to include a discussion of the significance of mere knowledge or mere presence (Pet. App. 11). The court gave as its reason for refusing the request the fact that the jury had asked for a definition of conspiracy and not a re-instruction on the law of conspiracy (March 6 Tr. 5-8).

Later the same day the jury sent a note requesting that the "definition" of conspiracy be re-read (March 6 Tr. 9-11). The court complied, and again rejected counsel's request to amplify the supplemental charge, noting that the jury had not shown a lack of ability to communicate when in need of an explanation and that the court was not inclined to highlight any particular part of the original lengthy charge on conspiracy by reinstructing as counsel requested (March 6 Tr. 11-12). Thereafter, the jury issued no further requests for supplemental instructions. The verdict was reached two days later (March 8 Tr. 8).

The scope of the supplemental instruction was within the sound discretion of the trial court. *United States* v. *Wharton*, 433 F.2d 451, 454 n.9 (D.C. Cir. 1970). The trial court did not abuse that discretion when it limited the re-instruction to precisely what the jury indicated it needed. *United States* v. *Clark*, 613 F. 2d 391, 405 (2d Cir. 1979), cert. denied, 449 U.S. 820 (1980); *United States* v. *Chatham*, 568 F. 2d 445, 451 n.10 (5th Cir. 1978); *Whiting* v. *United States*, 321 F. 2d 72, 75 n.3 (1st Cir.), cert. denied, 375 U.S. 884 (1963). The accuracy of the supplemental charge is not challenged, and petitioner has nothing more than speculation to offer in support of his assertion that the jury was confused and would have benefited from having two additional isolated portions of the conspiracy instructions read to it. Petitioner "is simply disappointed that the judge did not say more" in the supplemental charge. *United States* v. *Moreno-Nunez*, 595 F. 2d 1186, 1189 (9th Cir. 1979). The court of appeals was clearly correct in concluding that the trial court did not commit error, let alone reversible error, in this matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MERVYN HAMBURG
Attorney

MAY 1982

DOJ-1982-05

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
JUN 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1534

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM PACHECO NIEVES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

CARLOS V. GARCIA GUTIERREZ
Banco de Ponce Building
Suite 907
1250 Ponce de Leon Avenue
Santurce, Puerto Rico 00907
Tel. (809) 725-1020
Attorney of Record for Petitioner

Blanchard Press, Inc., Boston, Mass.—Law Printers

TABLE OF CONTENTS

	Page
Argument	1
Conclusion	6

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1534

WILLIAM PACHECO NIEVES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

Argument

The Brief for the United States in Opposition does not completely or accurately state the facts on several points which are crucial to the determination of this petition. Since the issue is precisely what inferences the jury could legitimately make on the evidence adduced at trial it is peculiarly important that the

facts not be slurred. Howevermuch the Government may be entitled to have the evidence seen in the light most favorable to the verdict, it is not entitled to the suppression of facts which would impede the inferential process on which the verdict necessarily rests in a case submitted to the jury on exclusively circumstantial evidence.

First. The removal of Delta documents from the debris left by the fire was not effectuated as described by the Government (Opp. 2).

On the morning after the fire Charles Benmuhar, the owner of the Delta warehouse, asked one of his employees to call petitioner at his home because authorization was needed to remove the firm's documents before they were damaged by water. Photographs had been taken and the documents had been carried outside before petitioner arrived. When he arrived at the scene petitioner shook hands with all present. He had been introduced to the Delta owners by one of their employees and had a social relationship with all of them. (T. 792-802.) This was done in the presence of the insurance company people. (T. 842.)

Before he went to the scene of the fire, however, petitioner invited his superior officer, the Director of the Criminal Investigation Corps, to visit the scene with him. The Director declined and instructed the petitioner to go there himself. (T. 1168-1172; 1192-1194.)

Second. There is nothing in the record to support the Government's assertion that a "complaint that suggested the existence of criminal conduct in connection with the fire" (Opp. 2.) existed at the time that petitioner received Delta employees in his office. The record cited by the Government (T. 1013-1014, 1067-1068, 1122-1123, 1128) in fact, clearly shows that the police investigate all fires to determine whether they are accidental or criminal and that no determination had been made, at the time the meeting took place, that any criminal conduct was involved.

Third. The testimony given by Braulio Donato with reference to the meeting at petitioner's office with Delta persons is completely set out by the Government. (Opp. 2-3.) On cross-examination Donato declared that in an important case such as the Delta fire it is not unusual for the Director to ask for status reports. Pacheco had told him that the people in his office were representatives from Delta before he asked him what the status of the investigation was. (T. 1133-1134.) And petitioner never suggested to Donato what agents to use in the investigation, nor did Pacheco ever impede, interfere with, obstruct or delay the investigation. Not with Donato and not with anyone that Donato knew. (T. 1135, 1145-1146.) What Donato found suspicious was that the people from Delta should come to find out about the investigation so soon. But it was natural for Pacheco to want to know. (T. 1135-1136.) During the months and years the investigation lasted this was the first and only time that Pacheco asked about the investigation. (T. 1138.)

It is precisely because such details are eliminated from the Government's statement and from the facts found by the Court of Appeals that the jury is supposed to have had enough evidence on which an inference could be made that conspiratorial activity was afoot. (Pet. App. 6.)

Fourth. The testimony of Alberto Ortiz as stated by the Government again omits important facts.

Alberto Ortiz was a member of the fire and arson squad of the CIC and he was assigned to the Delta fire case by his supervisors. On several occasions Pacheco, who was then Assistant or Acting Director, asked him questions as to the case's progress. On a previous occasion Ortiz stated under oath that Pacheco had only once asked a question about the investigation. (T. 1073.) Pacheco did not choose to ask him about other cases. (T. 995-1012.) But since Pacheco was the director Ortiz did not have the least feeling that anything could be wrong. (T. 1012.) In fact, until instructions not to reveal

anything about the investigation were issued, everybody asked questions about the case. (T. 1027.)

Pacheco had nothing to do with work assignments and Ortiz was in fact the second agent assigned to the case (T. 1018.) since the first agent assigned went on vacation. (T. 1069.)

At no time during the investigation did Pacheco interfere with the investigation on anyone's behalf and nobody asked Ortiz to divert or delay the investigation or find that the fire was accidental. (T. 1023-1025.) This was emphatically reaffirmed on redirect. (T. 1070.) Pacheco, in fact, had nothing to do with the investigation. (T. 1074.)

Fifth. The statement that petitioner "[. . .] took delivery of a new Pontiac automobile that Benmuhar had purchased in Miami the previous month for $5,650.00" (Opp. 3.) is again a conclusion made by the Government which does not disclose the shakiness of the evidence presented to the jury on who purchased the Pontiac. Every document related to that purchase is in the petitioner's name, including the notarized bill of sale. (T. 940-950; 953-959; 985-994.) And an FBI examiner of questioned documents could not affirm or deny that it was petitioner's signature which was on that bill of sale. The Government's evidence that it was Charles Benmuhar and not petitioner who bought the Pontiac was solely the testimony of immunized witnesses. (T. 897-903; 904-915.)

Sixth. The order given by Col. Miguel Rivera, Director of the Criminal Investigations Corps, and its relevance to petitioner (Opp. 3.) is taken entirely out of context.

During the course of the investigation Col. Rivera gave instructions to the agent in charge not to disclose any information to anyone in the CIC or even the superintendent because of the publicity which the case had attracted and because of the known relationship between Delta people with Pacheco and another officer. Rivera was introduced to the people from Delta by Pacheco at the latter's office within days of the fire but he did not remember how many days. (T. 1165-1166.) The

Delta people just wanted a preliminary report, not information as to suspects, witnesses or anything like that. Pacheco called Rivera before calling the agent in charge of the investigation and Rivera was present throughout the meeting. (T. 1195.) Other than Pacheco's relationship with people at Delta there was no reason to exclude him from the investigation. It was a matter of assuring the CIC's impartiality. Rivera never lost his trust in Pacheco. And although Rivera strictly supervised the investigation he knew of no interference, obstruction or delay caused by Pacheco. (T. 1175-1176.) In fact, he never lost his trust in Pacheco. (T. 1186.)

The inferential process on which the Government defends petitioner's conviction is only valid if facts which militate against the inferences made and the conclusion reached are suppressed or ignored. Both the Government and the Court of Appeals have supplied causal links, in what supposedly was the jury's logic, which are either not supported by the evidence or are in fact contrary to the evidence as interpreted by everyday, common sense logical principles.

The petitioner was convicted in a conspiracy trial which lasted several weeks and was convicted on purely circumstantial evidence. There is a full record. There are no standards to guide juries or appellate courts on how to conduct the inferential process which leads from circumstances to guilty or on the review of such processes. Only by allowing full briefs and argument on this matter can this Court dispose of a recurring problem in the area of conspiracy law and evidence in general.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

CARLOS V. GARCIA GUTIERREZ
Banco de Ponce Building
Suite 907
1250 Ponce de Leon Avenue
Santurce, Puerto Rico 00907
Tel. (809) 725-1020
Attorney of Record for Petitioner